Supreme Court, U. S.
FILED
MAY 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1776

In the Matter of the Application of

RAYMOND B. HARDING,

Appellant,

for a judgment pursuant to Articles 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, CHARLES J. WILCOX, District Attorney of Rensselaer County, THE TOWN COURT OF NASSAU, THE TOWN COURT OF SCHODACK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

HERBERT RUBIN
HOWARD L. WEXLER
BRUCE N. GYORY
40 Wall Street
New York, New York 10005
Phone: (212) 344-0680
Attorneys for Appellant

Of Counsel:
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
Phone: (212) 344-0680

May 7, 1980

INDEX

	PAGE
JURISDICTIONAL STATEMENT:	
(a) Opinions Below	2
(b) Grounds on Which Jurisdiction is Invoked	2
(i) Nature of the Proceeding	2
(ii) Original Judgment Sought to Be Reviewed	3
(iii) Statutory Provisions Conferring Jurisdiction	3
(iv) Cases Sustaining Jurisdiction	3
(v) Statute Involved	3
(c) Question Presented	4
(d) Statement of the Case	5
The Facts	5
How the Federal Question was Presented and Reasons Why the Appeal Should be Heard	6
(e) Substantiality of Federal Question	14
CONCLUSION	16
APPENDICES:	
Appendix A. Order of Court of Appeals, State of New York, February 7, 1980	A-1
Appendix B. Order for Judgment on Remittitur, Supreme Court of the State of New York, County of Albany, entered February 22, 1980	A-2
Judgment, entered February 22, 1980	A-4
Judgment, entered April 9, 1980	A-6
Appendix C. Order of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, entered May 9, 1979	A-8
Appendix D. Opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, dated April 12, 1979	A-11
Appendix E. Judgment of the Supreme Court of the State of New York, County of Albany, dated August 14, 1978	A-16

PAGE

Appendix F. Opinion of the Supreme Court of the State of New York, County of Albany, dated August 7, 1978 ..... A-19

Appendix G. Notice of Appeal to United States Supreme Court, dated May 1, 1980 ..... A-29

TABLE OF AUTHORITIES CITED

CASES:

Barry v. *Barchi*, 443 U.S. 55 (1979) 8-9, 12, 14

Bell v. *Burson*, 402 U.S. 535 (1971) 3-5, 8-9, 13-14

Dixon v. *Love*, 431 U.S. 105 (1977) 3-5, 7, 9-15

Horodner v. *Fisher*, 38 N.Y.2d 680, 382 N.Y.S.2d 28, 345 N.E.2d 571, *app. dsmd.*, 429 U.S. 802 (1976) 13

Mackey v. *Montrym*, 443 U.S. 1 (1979) 3-5, 7-15

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 3, 9-12

United States v. *Evans*, 574 F.2d 352 (6th Cir. 1978) 13

CONSTITUTIONAL PROVISION:

Fourteenth Amendment to the United States Constitution 5, 9

STATUTES:

United States Code:

28 U.S.C. § 1257(2) 3

28 U.S.C. § 2103 3

New York Statutes:

N.Y. Civil Practice Law and Rules Article 78 (McKinney 1963) 2, 3

N.Y. Vehicle and Traffic Law § 510(4-a) (McKinney Supp. 1979-80) .....*passim*

N.Y. Vehicle and Traffic Law § 511 (McKinney 1970) 6

IN THE

Supreme Court of the United States

October Term, 1979

No.

In the Matter of the Application of

RAYMOND B. HARDING,

Appellant,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, CHARLES J. WILCOX, District Attorney of Rensselaer County, THE TOWN COURT OF NASSAU, THE TOWN COURT OF SCHODACK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the February 7, 1980 order of the New York Court of Appeals, and submits this jurisdictional statement to show that the Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

(a) Opinions Below

The order of the Court of Appeals is reported at 49 N.Y. 2d 739 (1980) and appears as Appendix A hereto (A. 1). After remittitur, final judgments were entered in the Supreme Court of the State of New York, Albany County. The order for judgment on remittitur and judgments are unreported and appear as Appendix B hereto (A. 2-7).

The order of the Court of Appeals affirmed the unreported order of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department which appears as Appendix C hereto (A. 8-10). The affirmance was for the reasons stated in the opinion of the Appellate Division, Third Judicial Department. That opinion, which is reported at 67 A.D. 2d 242, 415 N.Y.S. 2d 286 (3rd Dep't 1979) and appears as Appendix D (A. 11-15), directed a reversal of the unreported judgment appealed from the Supreme Court of the State of New York, County of Albany (Appendix E; A. 16-18). The opinion of the Albany Supreme Court is unreported and is annexed as Appendix F (A. 19-28).

(b) Grounds on Which Jurisdiction is Invoked

(i) *Nature of the Proceeding.* This is an action for a judgment declaring N.Y. Vehicle and Traffic Law § 510 (4-a) (McKinney Supp. 1979-80) unconstitutional. The action was originally commenced as a special proceeding pursuant to N.Y. Civil Practice Law and Rules Article 78 (McKinney 1963) seeking, *inter alia,* to annul and vacate appellant's alleged motor vehicle license suspensions obtained by the unconstitutional law and to expunge *ab initio* all Motor Vehicle Department records of the illegal suspensions.

At the outset of the proceedings, appellee District Attorney of Rensselaer County ("District Attorney") and the Town Court of the Town of Nassau and the Town Court of the Town of Schodack were prohibited from proceeding against appellant in criminal actions stemming from charges of driving with a license that was suspended without procedural due process of law. The stay of proceedings expired with the New York Court of Appeals' decision.

The Supreme Court, County of Albany, converted the Article 78 (mandamus) proceeding into a declaratory judgment action in order to facilitate the determination of the constitutional issues. This conversion to a declaratory judgment action has been affirmed by the reviewing courts.

(ii) *Original Judgment Sought to Be Reviewed.* The order of the New York Court of Appeals was filed on February 7, 1980. After an order for judgment on remittitur, final judgments were entered in the Albany County Supreme Court by appellees Commissioner of Motor Vehicles ("Commissioner") and the District Attorney on February 22, 1980 and April 9, 1980, respectively. The order which is sought to be reviewed appears as Appendix A. The judgments entered as a consequence thereof appear as Appendix B. Notice of appeal to this Court was filed on May 2, 1980 (A. 31) and appears as Appendix G (A. 29-31).

(iii) *Statutory Provisions Conferring Jurisdiction.* The statutory provisions which confer jurisdiction of this appeal are 28 U.S.C. § 1257(2) and, alternatively, 28 U.S.C. § 2103.

(iv) *Cases Sustaining Jurisdiction.* Cases believed to sustain jurisdiction: *Mackey* v. *Montrym,* 443 U.S. 1 (1979); *Dixon* v. *Love,* 431 U.S. 105 (1977); *Mathews* v. *Eldridge,* 424 U.S. 319 (1976); *Bell* v. *Burson,* 402 U.S. 535 (1971).

(v) *Statute Involved.* The text of the pertinent part of N.Y. Vehicle and Traffic Law § 510(4)-(a) (McKinney Supp.

1979-80) ("VTL 510 (4-a)"), which is reproduced in the opinion of the Appellate Division (A. 13), provides:

> "4-a. Suspension for failure to answer an appearance ticket. Upon receipt of a court notification of the failure of a person to appear within three months of the return date or new subsequent adjourned date, pursuant to an appearance ticket charging said person with a violation of any of the provisions of this chapter (except one for parking, stopping, or standing) or of any lawful ordinance or regulation made by a local or public authority, relating to traffic (except one for parking, stopping, or standing) the commissioner or his agent may suspend the driver's license or privileges of such person pending receipt of notice from the court that such person has appeared in response to such appearance ticket. Such suspension shall take effect no less than thirty days from the day upon which notice thereof is sent by the commissioner to the person whose driver's license or privileges are to be suspended."

(c) Question Presented

The New York Court's construction of VTL 510(4-a), in direct contravention of *Mackey* v. *Montrym, supra,* 443 U.S. 1 (1979); *Dixon* v. *Love, supra,* 431 U.S. 105 (1977); *Bell* v. *Burson, supra,* 402 U.S. 535 (1971), grants to the Commissioner the power, by an equivocal notice, to suspend motor vehicle operator's licenses in a non-emergency situation without a right to some kind of hearing either before or immediately after the suspension of license.

The question is: Does New York's suspension of license procedure pursuant to VTL 510(4-a), as interpreted by the New York Court of Appeals, offend the constitutionally

guaranteed rights afforded by the Due Process Clause of the Fourteenth Amendment as these rights have been defined by this Court in *Mackey* v. *Montrym, supra,* 443 U.S. 1 (1979); *Dixon* v. *Love, supra,* 431 U.S. 105 (1977); *Bell* v. *Burson, supra,* 402 U.S. 535 (1971)?

(d) Statement of the Case

The Facts.

Appellant is the holder of a regular issued New York State Class 4 Motor Vehicle Operator's License which he requires in order to drive from his home to his employment. On June 20, 1977, he was ticketed for speeding in the Town of Catskill, New York.

The alleged failure to answer this ticket in three months prompted the local police judge to send out a notice dated October 19, 1977 on a Motor Vehicle Department form designated as MV-1160. Form MV-1160 provided, among other things, the conditional and vague statement that its recipient's license will be suspended:

> "30 days from the date of this notice unless we have been informed by the Court that you have answered the summons *or your record indicates that other action is necessary.*" (emphasis supplied.)

On November 15, 1977, less than 30 days later, appellant answered the summons by sending the Catskill Town Justice a request for an adjournment of the time in which to respond to the ticket. Appellant was never asked to surrender his license and no other word relative to the ticket or any alleged suspension was communicated to the licensed driver by the Commissioner or his Department of Motor Vehicles. No provision for a hearing was made.

Appellant had earlier been ticketed for speeding in the Town of Saugerties on May 24, 1977. A Form MV-1160 had not been sent by the Commissioner with respect to the ticket until November 30, 1977. The fact that two independent violations were charged, however, in no way affects the issue to be reviewed on this appeal. Besides, it has been admitted that there is no record evidence in the office of the Commissioner of any suspension by reason of the May 24, 1977 Saugerties incident at the relevant times.

On March 30, 1978, in the town of Nassau, New York, appellant was charged with the crime of operating a vehicle with a suspended driver's license, a misdemeanor under N.Y. Vehicle and Traffic Law § 511 (McKinney 1970). The first unequivocal notification that appellant's license had in fact been previously suspended by the Department of Motor Vehicles was thus rendered after the jeopardy of a criminal conviction attached. Subsequently, on April 12, 1978, a second charge was filed against appellant for driving in the Town of Schodack on March 11, 1978 while his license was suspended.

How the Federal Question was Presented and Reasons Why the Appeal Should be Heard.

After criminal proceedings were started, this civil suit was commenced. In his Article 78 petition and affidavit in support of the order to show cause bringing on the proceeding, appellant immediately raised the federal constitutional question claiming lack of due process. He argued that the notice of suspension was impermissibly vague, VTL 510(4-a) was unconstitutional and appellant was never provided an opportunity to be heard with respect to the license suspension. Following the trial court's grant of a judgment declaring the procedures of the Commissioner unlawful and VTL 510(4-a) unconstitutional (A.16-18),

appeals were taken by the Commissioner and the District Attorney. The Appellate Division reversed. That Court held that the lack of a pre-suspension hearing was not violative of federal due process, since review of the suspension was available in accordance with New York's mandamus statute, N.Y. Civil Practice Law and Rules Article 78.(A.15) The Appellate Division opinion preceded *Mackey* v. *Montrym, supra,* 443 U.S. 1 (1979) where four Supreme Court justices said:

> "[T]he constitutional guarantee of procedural due process has always been understood to embody a presumptive requirement of notice and a meaningful opportunity to be heard *before* the State acts finally to deprive a person of his property. *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 313; *Fuentes* v. *Shevin,* 407 U.S. 67, 82; *Boddie* v. *Connecticut,* 401 U.S. 371, 378; *Bell* v. *Burson, supra,* 402 U.S., at 542: *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U.S. 1, 16, 19."
>
> * * *
>
> "When a deprivation is irreversible—as is the case with a license suspension that can at best be shortened but cannot be undone—the requirement of some kind of hearing before a final deprivation takes effect is all the more important. Thus, in *Bell* v. *Burson,* the Court deemed it fundamental that 'except in emergency situations' the State must afford a prior hearing before a driver's license termination becomes effective. 402 U.S., at 542." 443 U.S. at 20-21 (dissenting opinion).*

---

* The *Montrym* minority's distinguishment of *Dixon* v. *Love, supra,* 431 U.S. 105 (1977), the United States Supreme Court decision relied upon by the state court, which is also applicable here, is discussed at p. 11, *infra. Montrym* was argued by the parties before New York's Court of Appeals, which chose to adopt the Appellate Division's opinion without further comment.

The *Montrym* majority relied heavily upon the deterrent effect of the Massachusetts proceeding on heavy drinking and the impact of such proceeding on public safety. None of these arguments apply here.

We are not presented with the "emergency situation" exception here: "Emergency situations have generally been defined as those in which *swift* action is necessary." *Mackey* v. *Montrym, supra,* 443 U.S. at 21, n. 1 (emphasis supplied, dissenting opinion). By the terms of VTL 510 (4-a), the suspension may not be effectuated "no less than thirty days" from the day the Commissioner sends MV-1160 to the driver.* The notice itself cannot be sent less than "three months" after the return date of the summons. Were the situation an "emergency" immediate action** would have been required.

> "[T]he precedents supporting *ex parte* action have not turned simply on the significance of the governmental interest asserted. To the contrary, they have relied upon the extent to which that interest will be frustrated by the delay necessitated by a prior hearing." *Mackey* v. *Montrym, supra,* 443 U.S. at 25 (dissenting opinion).

Further, the suspension penalty under VTL 510(4-a) is subject to the discretion of the Commissioner who "may" suspend the license. It is not mandatory. *See, Mackey* v.

---

* In *Bell* v. *Burson, supra,* 402 U.S. 535 (1971) this Court found that an emergency situation did not exist when the Georgia legislation under review called for revocation "within 30 days." 402 U.S. at 526, n. 1. In *Barry* v. *Barchi,* 443 U.S. 55 (1979) the concurring opinion noted that the elapse of "16 days" between the determination of a possible violation and the issuance of a supension order was "hardly consistent" with the "claim that summary suspensions are necessary to serve important state interests." 443 U.S. at 73, n. 5.

** As an example, the suspension stemming from the May 24, 1977 incident was not imposed for more than seven months after the issuance of the Saugerties ticket.

Montrym, supra ("the Registrar . . . has no discretionary authority to stay a suspension *mandated* by the statute."), 443 U.S. at 6 (emphasis supplied). *Compare also, Dixon* v. *Love, supra,* 431 U.S. 105 (1977), where the revocation of license was mandated by the applicable state law.

Once discretion with respect to the imposition of the suspension was available, a hearing was required:

> "The very act of dealing with what purports to be an "individual case" without first affording the person involved the protection of a hearing offends the concept of basic fairness that underlies the constitutional due process guarantee." *Mackey* v. *Montrym, supra,* 443 U.S. at 20-21 (dissenting opinion).

Finally, the prompt restoration of the license upon his appearance in court, irrespective of how unsafe the driver may be, belies any relationship with public safety.

That a loss of a driver's license is a deprivation of property that requires due process protection is undisputed. *Mackey* v. *Montrym, supra,* 443 U.S. at 10, n. 7; *Dixon* v. *Love, supra,* 431 U.S. 105, 112 (1977); *Bell* v. *Burson, supra,* 402 U.S. 535, 539 (1971). Since this Court determined that the interest at stake is protected by the Due Process Clause, the inquiry consists of "what process is due." *Barry* v. *Barchi, supra,* 443 U.S. 55, 71 (1979) (concurring opinion).

In *Mathews* v. *Eldridge, supra,* 424 U.S. 319 (1976), this Court formulated a three-pronged balancing test for determining the dictates of due process in regard to the right to a hearing under the Fourteenth Amendment of the Constitution:

> "[I]dentification of the specific dictates of due process generally requires consideration of three

> distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

This "balancing test" has been applied in the two Supreme Court decisions rendered subsequent to *Mathews* v. *Eldridge,* which involved the loss of drivers' licenses. *Dixon* v. *Love, supra,* 431 U.S. 105 (1977); *Mackey* v. *Montrym, supra,* 443 U.S. 1 (1979).

The *Montrym* minority, in explaining the flexibility and standards inherent in the *Eldridge* test, noted that in situations such as this, a pre-suspension hearing is constitutionally required:

> "The dimensions of a prior hearing may, of course, vary depending upon the nature of the case, the interests affected, and the prompt availability of adequate postdeprivation procedures. *Boddie* v. *Connecticut, supra; Mathews* v. *Eldridge,* 424 U.S. 319, 334-335. But when adjudicative facts are involved, when no valid governmental interest would demonstrably be disserved by delay, and when full retroactive relief cannot be provided, an after-the-fact evidentiary hearing on a critical issue is not constitutionally sufficient." *Mackey* v. *Montrym, supra,* 443 U.S. at 21-22.

Although in *Dixon* v. *Love, supra,* 432 U.S. 105 (1977) this Court held that a hearing need not be made available in all cases prior to a suspension, the underlying facts of

Love are distinguishable. There, official records or other sufficient evidence of repeated convictions of traffic offenses indicated a lack of ability to safely operate a vehicle. In *Love,* revocation was mandatory, not discretionary, because the state law required revocation where there were three suspensions in ten years. The three prior suspensions, likewise, afforded evidence of an unsafe driver. Moreover, the driver in *Love* had had the opportunity for a full judicial hearing in connection with each of the three prior suspensions. Unlike the issue here, the issue there was one of "safety on the roads and highways and in the prompt removal of a safety hazard." 431 U.S. at 114.

The dissent in *Montrym* aptly noted:

> "*Love* then involved an instance in which a revocation followed virtually automatically from the fact of duly obtained convictions for a stated number of traffic offenses. It established no broad exception to the normal presumption in favor of a prior hearing." 443 U.S. at 22.

The New York procedure, unlike the Illinois law in *Love,* does not provide any opportunity for a full judicial hearing in connection with the non-appearance violation, on which the suspension is based (431 U.S. at 113). Under the New York law, as it has been construed by the New York courts, a licensee does not have any right to a hearing. Thus, the consideration of previous hearing opportunities, which was an important—perhaps crucial—factor in the *Love* Court's invocation of the *Eldridge* balancing test analysis, is absent in this case. This case is also in marked contrast with the Massachusetts law reviewed in *Montrym,* which provided a post-suspension hearing "*immediately* upon a driver's suspension." 443 U.S. at 12. The New York Court has held that court review of the administrative action suffices. No

timely post-suspension agency hearing is provided by the agency. *See, Barry* v. *Barchi, supra,* 443 U.S. 55 (1979).

In addition, the private interest in the instant controversy is far stronger than the "substantial" interest in *Love* or *Montrym* (443 U.S. at 11). As a result of the lack of hearing and definitive notice, appellant faces a misdemeanor conviction, which could result in a deprivation of liberty, in addition to the loss of his driver's license. Consequently, the strong private interest of appellant mandates a pre-termination hearing.

The second stage of the *Eldridge* test involves an investigation of the likelihood of an erroneous deprivation of the private interest which is involved as a result of the procedures used by the state. The short answer to the likelihood of erroneous deprivation is the fact that one occurred in this case. Notwithstanding this, the relative reliability of the procedures invoked by New York are highly suspect, as a result of the vagueness of the notice provided by Form MV-1160 coupled with the absence of a hearing to ascertain, among other things, whether or not the motorist who received Form MV-1160 attempted to answer the summons or took any other action that would cause the Commissioner to exercise his discretion against suspension. The notice provides that if "your record indicates that other action is necessary" it will be taken. But the driver is given no opportunity to present evidence with respect to his individual circumstances.

In short, the New York procedure encourages rather than mitigates the potential for mistakes. This situation is sharply antithetical to basic constitutional precepts. A citizen can be charged with a criminal act even after his full compliance with the statute. The jeopardy is aggravated because there are no instructions as to how or where to turn

over the suspended vehicle operator's license. No provision is made for further notices specifying whether the suspension has been effected and the exact date and time of suspension. An opportunity for even the most informal kind of a hearing, either before or immediately after the suspension, would eliminate all problems.

The compelling interest of the state in preserving the safety of the roads which distinguished *Love* and *Montrym* from *Bell* v. *Burson* does not exist in this case. Although New York courts sought to justify the interest here as one of removing "reckless drivers" from the road (A.15), no support whatsoever for this conclusion exists.* The state interest underlying VTL 510 (4-a) is the efficiency of the agency which is achieved by inducing the court appearance of ticketed motorists. *See, Mackey* v. *Montrym, supra*, 443 U.S. at 20 (dissent). There, Justice Stewart remarked: "Happily, the Constitution recognizes higher values than speed and efficiency." *Id.*, 443 U.S. at 27 (dissent). Implicit in the analysis is the fundamental notion that due process "protects not simply against the risk of an erroneous decision. It also protects a vulnerable citizenry from the overbearing concern for efficiency . . . that may characterize praiseworthy government officials no less . . . than mediocre ones." *Id.*, 443 U.S. at 20 (dissent).

---

* A vehicle driver is not "reckless" solely because a summons for a moving violation is issued. Cf. *United States* v. *Evans*, 574 F.2d 352, 354 (6th Cir. 1978). Reckless or unsafe drivers are dealt with by immediate mandatory revocation of license elsewhere within the statutory scheme. *See, e.g., Horodner* v. *Fisher*, 38 N.Y.2d 680, 382 N.Y.S.2d 28, 345 N.E.2d 571, *app. dsmd*, 429 U.S. 802 (1976). Several violations, which are encompassed by VTL 510 (4-a), bear no relation to safety or recklessness. A license which is suspended pursuant to VTL 510 (4-a) is immediately restored upon the motorist's appearance—guility or innocent—with respect to the traffic ticket.

A hearing need not mean the inauguration of an unbearable administrative apparatus in New York State as the hearing need not be a full evidentiary one. In *Burson,* the Court held that the components of the hearing it mandated must be appropriate to the nature of the case (402 U.S. at 542). But no matter how informal, the hearing requirement cannot be constitutionally dispensed with altogether. *Barry* v. *Barchi, supra,* 443 U.S. 55 (1979). The New York procedure denies the right to a fair hearing because it affords no opportunity, not even an informal one, at any time to controvert the suspension. The statutory scheme affords ample time and occasion in which to provide a hearing. No justification exists for the deprivation of this substantial constitutional right.

(e) Substantiality of Federal Question

"[N]o broad exception to the normal presumption in favor of a prior hearing" should be established. *Mackey* v. *Montrym, supra,* 443 U.S. at 22 (dissent). A question exists as to what vitality the "emergency" exception to adherence to due process safeguards can have if a state is permitted to eliminate due process whenever significant, though non-immediate situations are involved. *Bell* v. *Burson, supra,* 402 U.S. at 542 (1971); *Mackey* v. *Montrym, supra,* 443 U.S. at 21 (1979) (dissent).

The question of what process is due prior to a driver's license being suspended in this circumstance is far from settled. *Compare, Bell* v. *Burson, supra,* and the four judge minority opinion in *Mackey* v. *Montrym, supra,* with *Dixon* v. *Love, supra,* and the majority *Montrym* decision. A clear statement by this Court as to what safeguards must be provided before a suspension can be effectuated would aid each of the fifty states in conforming their laws to the constitution. This could reduce the number of claims asserted in federal courts challenging the lack of due process afforded

with respect to suspension of licenses. It would also safeguard the rights of the many owners of licenses who regard these property rights as important to their livelihoods.

In *Dixon* v. *Love, supra,* 431 U.S. at 105, n. 11. this court noted several of the many decisions in which various state and federal courts sustained suspension or revocation of driving privileges without prior hearing where "earlier *convictions* were on the record" (emphasis supplied). In *Montrym,* the dissenters carefully pointed out that convictions were to be distinguished from unproven charges when "no prior hearing of any kind" is available "to contest the critical factual allegations upon which the suspension is based." 443 U.S. at 22. If the instant case is not reversed, it will be construed by courts to mean that even where license suspension is available only as a discretionary penalty, a pre-suspension hearing can be dispensed with. All that a state will be required to do is claim that its interest in obtaining compliance with its laws is reasonable. And this is expressly forbidden:

> "But there is no room for this type of argument in our constitutional system. A State is simply not free to manipulate Fourteenth Amendment procedural rights to coerce a person into compliance with its substantive rules, however important it may consider those rules to be." *Mackey* v. *Montrym, supra,* 443 U.S. at 26-27 (1979) (four justices dissenting).

CONCLUSION

Appellant respectfully requests that this Court reverse the order of the Court of Appeals of New York and the judgments entered in accordance with said order.

Respectfully submitted,

HERBERT RUBIN
HOWARD L. WEXLER
BRUCE N. GYORY
40 Wall Street
New York, New York 10005
Phone: (212) 344-0680
Attorneys for Appellant

Of Counsel:
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
Phone: (212) 344-0680

May 7, 1980

Appendices

APPENDIX A

State of New York
COURT OF APPEALS

Decisions of February 7, 1980

* * *

No. 55

IN THE

MATTER OF

RAYMOND B. HARDING,

Appellant,

vs.

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, *et al.*,

Respondents.

Order affirmed, with costs, for the reasons stated in the opinion by Mr. Justice J. Clarence Herlihy, at the Appellate Division (67 A D 2d 242).

All concur.

APPENDIX B

Order for Judgment on Remittitur

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

Index No. 6363-78

Entered February 22, 1980

In the Matter of the Application of

RAYMOND B. HARDING,

Petitioner-Appellant,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES B. MELTON, Commissioner of New York State Department of Motor Vehicles, CHARLES J. WILCOX, District Attorney of Rensselaer County, THE TOWN COURT OF THE TOWN OF NASSAU, THE TOWN COURT OF THE TOWN OF SCHODACK,

Respondents.

Present:

HON. ROBERT C. WILLIAMS, *Justice Presiding.*

RAYMOND B. HARDING, the Petitioner-Appellant herein, having appealed to the Court of Appeals of the State of New York from an Order of the Appellate Division, Third Department, entered in the office of the Clerk of said Court on the 9th day of May, 1979, which Order reversed, on the

law a judgment of the Supreme Court at Special Term (Williams, J.) entered August 17, 1978 in Albany County, and directed judgment to be entered in favor of the Respondents declaring that paragraph (a) of subdivision 4 of section 510 of the Vehicle and Traffic Law is constitutional and that form MV-1160 is not unconstitutional or illegal and the Court of Appeals, having heard said appeal and ordered and adjudged that the Order so appealed from be affirmed, with costs, and the Remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of Albany.

Now, on motion of Robert Abrams, by Joseph J. Micare, it is

ORDERED, that the judgment of the Court of Appeals be, and the same hereby is made the judgment of this Court, and that a judgment of this Court be entered herein affirming said judgment, with costs of said appeal to be taxed against the Petitioner-Appellant herein.

Signed the 18th day of February, 1980.

/s/ ROBERT C. WILLIAMS
Justice, Supreme Court

Enter.

Judgment

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

Index No. 6363-78

February 22, 1980

In the Matter of the Application of
RAYMOND B. HARDING,

Petitioner-Appellant,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES B. MELTON, Commissioner of New York State Department of Motor Vehicles, CHARLES J. WILCOX, District Attorney of Rensselaer County, THE TOWN COURT OF THE TOWN OF NASSAU, THE TOWN COURT OF THE TOWN OF SCHODACK,

Respondents.

Raymond B. Harding, the Petitioner-Appellant herein, whose address is 3135 Johnson Avenue, Riverdale, New York, having appealed to the Court of Appeals of the State of New York from an Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Court on the 9th day of May, 1979, which Order reversed, on the law, a judgment of the Supreme Court at Special Term (Williams, J.) entered August 17, 1978 in the office of the Clerk of the County of Albany, and directed judgment to be entered in favor of the Respondents declaring that paragraph (a) of subdivi-

sion 4 of Section 510 of the Vehicle and Traffic Law is constitutional and that form MV-1160 is not unconstitutional or illegal, and the Court of Appeals, after due deliberation, having rendered a decision on the 7th day of February, 1980 affirming the Order of the Appellate Division, Third Department, with costs, and an Order having been entered so affirming, it is hereby:

Adjudged, that the aforesaid Order of the Appellate Division be, and the same hereby is affirmed, with costs of $102.50 to the Respondent James P. Melton, Commissioner of New York State Department of Motor Vehicles, and that the Respondent have execution thereon.

/s/ Mary S. Lindsay
Deputy Clerk

Dated and Entered: Feb. 22, 1980

Judgment

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

Index No. 6363-78

April 9, 1980

In the Matter of the Application of
RAYMOND B. HARDING,

Petitioner-Appellant,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, Charles J. Wilcox, District Attorney of Rensselaer County, The Town Court of the Town of Nassau, The Town Court of The Town of Schodack,

Respondents.

Raymond B. Harding, the Petitioner-Appellant, herein, whose address is 3135 Johnson Avenue, Riverdale, New York, having appealed to the Court of Appeals of the State of New York from an Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Court on the 9th day of May 1979, which Order reversed, on the law, a judgment of the

Supreme Court at Special Term (Williams, J.) entered August 17, 1978 in the office of the Clerk of the County of Albany, and directed judgment to be entered in favor of the Respondents declaring that paragraph (a) of Subdivision 4 of Section 510 of the Vehicle and Traffic Law is constitutional and that form MV-1160 is not unconstitutional or illegal, and the Court of Appeals, after due deliberation, having rendered a decision on the 7th day of February 1980, affirming the Order of the Appellate Division, Third Department, with costs, and an Order having been entered so affirming, it is hereby:

> Adjudged, that the aforesaid Order of the Appellate Division be, and the same hereby is affirmed, with costs of $74.38 to the Respondent Charles J. Wilcox, District Attorney of Rensselaer County, and that the Respondent have execution thereon.

/s/ MARY S. LINDSAY

.....

Dated: and Entered:
April 9, 1980

APPENDIX C

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 5th day of February, 1979.

PRESENT Hon. A. Franklin Mahoney, *Presiding Justice*
Hon. Louis M. Greenblott
Hon. Michael E. Sweeney
Hon. Ellis J. Staley, Jr.
Hon. J. Clarence Herlihy, *Justices.*

ORDER 34198

In the Matter of the Application of

RAYMOND B. HARDING,

Petitioner-Respondent,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, CHARLES J. WILCOX, District Attorney of Rensselaer County, The Town Court of Nassau, The Town Court of Schodack,

Respondents-Appellants.

An appeal having been taken to this Court by respondents-appellants James P. Melton, Commissioner of New

York State Department of Motor Vehicles, and Charles J. Wilcox, District Attorney of Rensselaer County from a judgment of the Supreme Court at Special Term (Robert C. Williams, *J.*) entered August 17, 1978 in Albany County, which converted petitioner's application, in a proceeding pursuant to CPLR article 78, to a declaratory judgment action, declared section 519 [sic] (subd. 4, par [a]) unconstitutional and vacated an order of the respondent Commissioner of Motor Vehicles, which suspended petitioner's driver's license, and said appeal having come on before this Court on February 5, 1979 and Robert Abrams, Attorney General having appeared by Mr. Joseph J. Micare and Ms. Shirley Adelson Siegel of counsel for the respondent-appellant James P. Melton, and Charles J. Wilcox, District Attorney, by Mr. Robert Adams of counsel for the respondent-appellant Charles J. Wilcox and Herzfeld & Rubin, P.C. by Mr. Herbert Rubin of counsel for the petitioner-respondent; and due deliberation having been had thereon, and upon the memorandum decision of Hon. J. Clarence Herlihy, filed April 12, 1979 with which all Justices concur, it is unanimously

ORDERED and adjudged, that the judgment appealed from be and the same is hereby reversed, on the law, with costs, and it is further

ORDERED, that paragraph (a) of subdivision 4 of section 510 of the Vehicle and Traffic Law is constitutional, and it is further

ORDERED, that Motor Vehicle form MV-1160 is not unconstitutional or illegal, and it is further

ORDERED, that the stay of all proceedings granted by Order of the Supreme Court, Albany County entered July 18, 1978 by Justice William R. Murray staying all proceedings against petitioner-respondent for allegedly operating a motor vehicle while his license was allegedly suspended

be and the same hereby is continued, with leave to respondents-appellants to move to vacate the stay if notice of appeal to the Court of Appeals is not duly served and Record on Appeal and Petitioner's Brief duly filed with the Court of Appeals within sixty days of this Order.

ENTER:

JOHN J. O'BRIEN

.....

Clerk

Dated and Entered:

May 9, 1979.

A TRUE COPY
John J. O'Brien
Clerk

APPENDIX D

Opinion

Supreme Court—Appellate Division

Third Judicial Department

April 12, 1979. 34198

In the Matter of
RAYMOND B. HARDING,

Respondent,

v.

JAMES P. MELTON, as Commissioner of Motor Vehicles of the State of New York, *et al.*,

Appellants.

Judgment reversed, on the law, with costs, and judgment directed to be entered in favor of the appellants declaring that paragraph (a) of subdivision 4 of section 510 of the Vehicle and Traffic Law is constitutional and that form MV-1160 is not unconstitutional or illegal. Settle order on notice.

Opinion per HERLIHY, *J.*

MAHONEY, *P.J.*, GREENBLOTT, SWEENEY and STALEY, JR., *JJ., concur.*

#34198

STATE OF NEW YORK

SUPREME COURT—APPELLATE DIVISION

THIRD DEPARTMENT

In the Matter of

RAYMOND B. HARDING,

Respondent,

against

JAMES P. MELTON, as Commissioner of Motor Vehicles of the State of New York, *et al.*,

Appellants.

Argued, February 5, 1979.

BEFORE: Hon. A. FRANKLIN MAHONEY,

Presiding Justice,

Hon. LOUIS M. GREENBLOTT,
Hon. MICHAEL E. SWEENEY,
Hon. ELLIS J. STALEY, JR.,
Hon. J. CLARENCE HERLIHY,

Associate Justices.

APPEALS from a judgment of the Supreme Court at Special Term (Robert C. Williams, *J.*), entered August 17, 1978 in Albany County, which converted petitioner's application, in a proceeding pursuant to CPLR article 78, to a declaratory judgment action, declared section 510 (subd. 4, par. [a]) unconstitutional and vacated an order of the appellant Commissioner of Motor Vehicles, which suspended petitioner's driver's license.

ROBERT ABRAMS, Attorney General (Joseph J. Micare and Shirley Adelson Siegel of counsel), for James P. Melton, appellant, The Capitol, Albany, New York 12224.

CHARLES J. WILCOX, District Attorney, Rensselaer County (Robert Adams of counsel), for Charles J. Wilcox, appellant, Court House, Troy, New York 12180.

HERZFELD & RUBIN, P.C. (Herbert Rubin of counsel), for respondent, 40 Wall Street, New York, New York 10005.

OPINION FOR REVERSAL

HERLIHY, *J.*

Section 510 (subd. 4, par. [a]) of the Vehicle & Traffic Law (hereinafter referred to as section 510) provides, in pertinent part, as follows:

> Upon receipt of a court notification of the failure of a person to appear within three months of the return date or new subsequent adjourned date, pursuant to an appearance ticket charging said person with a violation of any of the provisions of this chapter (except one for parking, stopping or standing) of any lawful ordinance or regulation made by a local or public authority, relating to traffic (except one for parking, stopping or standing) the commissioner or his agent may suspend the driver's license or privileges of such person pending receipt of notice from the court that such person has appeared in response to such appearance ticket. Such suspension shall take effect no less than thirty days from the day upon which notice thereof is sent by the commissioner to the person whose driver's license or privileges are to be suspended.

In conformity with section 510, the Department of Motor Vehicles issued a notice to the petitioner that his license was being suspended, effective 30 days from the date of the notice, for his failure to answer summonses for traffic violations issued on May 24, 1977 and June 20, 1977. The notice is on a printed form which is designated MV-1160 and it provides in its printed portion that it "will become effective thirty days from the date of the notice, unless we have been notified by the court that you have answered the summons or your record indicates that other action is necessary."

The petitioner has contended that section 510 is unconstitutionally vague; that the form MV-1160 is a rule or statement which must be filed with the Secretary of State (N.Y. Const., art. IV, § 8); and that the form MV-1160 is unconstitutionally vague. In addition to the foregoing, the petitioner contends that because a driver's license is recognized as a property right, there is a constitutional right to a pre-suspension hearing.

In the case of *Matter of Horodner* v. *Fisher* (38 N.Y.2d 680, app. dsmd. 429 U.S. 802), it was held that in proceedings such as the instant one where the attack is on the suspension itself, the appropriate procedure is to convert the matter to declaratory judgment and proceed to meet the constitutional issues. Accordingly, Special Term did not err in so converting the proceeding and determining the issues.

There is no support for the conclusion of Special Term that section 510 is vague as to a definite date for suspension or as to proper notice. As quoted hereinabove, section 510 expressly provides that there must be a minimum period of 30 days from the date of the notice of suspension and it is expressly limited to last no longer than the failure of a licensee to appear after such notice is given (see *Kane* v. *City of Brooklyn,* 114 N.Y. 586). Section 510 expressly required notice to the licensee and there is no vagueness in that regard.

The contention that the form MV-1160 is a rule or somehow unconstitutionally vague is likewise without any support. The statute expressly requires that notice be given to motorists and the form herein is nothing more nor less than the transmittal of notice. There is nothing about the MV-1160 which shows it to be a statement implementing or applying law (Executive Law, § 101-a, subd. 1, par. [b]). While it recites the statutory basis for the notice, it does not in any way purport to be anything other than the statutory notice. Accordingly, Special Term erred in construing the MV-1160 as not complying with section 510. The language of MV-1160 quoted hereinabove which indicates that the suspension would become effective 30 days after the date of the notice "unless * * * your record indicates that other action is necessary" is not vague and does not undermine the effectiveness of the notice. It is upon its face a reservation of the right of the Department of Motor Vehicles to take whatever action it might be authorized to take upon a review of his record. This is a power which it had regardless of the particular conduct which prompted the issuance of the MV-1160 because of his failure to appear in court.

Finally, the lack of a pre-suspension hearing is not violative of the petitioner's due process rights. In this case the State's interest is in keeping reckless drivers off the road as was the situation in *Matter of Horodner* v. *Fisher* (*supra*). Under such circumstances, the available review pursuant to CPLR article 78 of the order issued is sufficient protection (*Dixon* v. *Love*, 431 U.S. 105; *Matter of Horodner* v. *Fisher*, *supra*).

The judgment should be reversed, on the law, with costs, and the judgment directed to be entered in favor of the appellants declaring that paragraph (a) of subdivision 4 of section 510 of the Vehicle and Traffic Law is constitutional and that form MV-1160 is not unconstitutional or illegal. Settle order on notice.

APPENDIX E

Judgment

Dated August 14, 1978

Index No. 6363-78

At a Special Term, Part I, of the Supreme Court, held in and for the County of Albany at the County Court House in the City of Albany on the 28th day of July, 1978.

PRESENT: Hon. ROBERT C. WILLIAMS, *Justice Presiding.*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

———o———

In the Matter of the Application of

RAYMOND B. HARDING,

Petitioner,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, Charles J. Wilcox, District Attorney of Rensselaer County, the Town Court of the Town of Nassau, The Town Court of the Town of Schodack, William G. Connelie, Superintendent of State Police, Edward G. Hines, State Trooper, and Donald E. Morse, State Trooper,

Respondents.

———o———

On reading and filing the order to show cause, dated July 18, 1978, verified July 17, 1978, praying for judgment

(a) annulling any purported suspensions of the motor vehicle operator's license of petitioner by respondent Commissioner, pursuant to section 510(4-a) of the Vehicle and Traffic Law, upon the ground that such law is unconstitutional and such suspensions were unconstitutional; (b) compelling respondent Commissioner forthwith to expunge and vacate *ab initio* all reference in the records and files of respondent Commissioner to any alleged suspensions of petitioner's motor vehicle operator's license by reason of MV-1160 forms annexed to petition as Exhibit A and B; (c) forever prohibiting respondents from proceeding further against petitioner for allegedly operating a motor vehicle while his license was allegedly so suspended; and on reading and filing the exhibits annexed to the petition, the affidavit of Raymond B. Harding, sworn to July 17, 1978, and proof of service thereof; and on reading and filing the answer of respondent Commissioner, verified July 27, 1978, and the exhibits thereto annexed, and the affidavit of Thomas E. McManus, sworn to July 27, 1978, and the exhibits thereto annexed; and on reading and filing the answer of respondent Superintendent, verified July 26, 1978, and the affidavit of William G. Connelie, sworn to July 26, 1978, thereto annexed; and on reading and filing the reply, verified August 2, 1978, and the exhibit thereto annexed; and it appearing to this Court that on the pleadings and accompanying papers no triable issue of fact is raised and having heard David B. Alford, attorney for petitioner, in support hereof, and Hon. Joseph J. Micare, Assistant Attorney General, of counsel for respondents Melton and Connelie, in opposition, and Hon. Richard J. Piedmont, Assistant District Attorney of Rensselaer County, of counsel for respondent Wilcox also in opposition; and after due deliberation the Court having made and filed its decision in writing;

Now, on motion of David B. Alford, attorney for petitioner, it is

ORDERED, ADJUDGED and DECREED that paragraph or subdivision 4-a of section 510 of the Vehicle and Traffic Law is unconstitutional for the reasons set forth in said decision; and it is further

ORDERED, ADJUDGED and DECREED that respondent Commissioner's form MV-1160 is unconstitutional for the reasons set forth in said decision; and it is further

ORDERED, ADJUDGED and DECREED that respondent James P. Melton, Commissioner of New York State Department of Motor Vehicles, forthwith expunge and vacate *ab initio* all reference in his records and files to any alleged suspensions of petitioner's motor vehicle operator's license by reason of MV-1160 forms annexed to the petition as Exhibits A and B; and it is further

ORDERED, ADJUDGED and DECREED that respondents Charles J. Wilcox, District Attorney of Rensselaer County, The Town Court of the Town of Nassau and the Town Court of the Town of Schodack be and are hereby forever prohibited from proceeding further against petitioner for allegedly operating a motor vehicle while his license was allegedly so suspended; and it is further

ORDERED that respondents William G. Connelie, Superintendent of State Police, Edward G. Hines, State Trooper, and Donald E. Morse, State Trooper, are neither necessary nor proper parties respondent herein and are hereby dropped as parties respondent pursuant to CPLR 1003. Signed at Monticello, New York, August 14th, 1978.

/s/ ROBERT C. WILLIAMS

.....

Robert C. Williams
Justice of the Supreme Court

APPENDIX F

Opinion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Dated August 7, 1978

—o—

In the Matter of the Application of

RAYMOND B. HARDING,

Petitioner,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, Charles J. Wilcox, District Attorney of Rensselaer County, The Town Court of the Town of Nassau, The Town Court of the Town of Schodack, William G. Connelie, Superintendent of State Police, Edward G. Hines, State Trooper, and Donald E. Morse, State Trooper,

Respondents.

—o—

Albany County Special Term, July 28, 1978

Motion No. 48

Index No. 6363-78

Justice ROBERT C. WILLIAMS, *presiding.*

APPEARANCES: David Alford, Esq., Attorney for Petitioner. 96/128 Main Street, Middleburg, New York 12122

Hon. Louis J. Lefkowitz, Attorney General. Joseph J. Micare, Assistant Attorney General, of Counsel. Attorney for Respondent James P. Melton. The Capitol, Albany, New York

Charles J. Wilcox, Esq., District Attorney of Rensselaer County. Richard Piedmont, Esq., Assistant District Attorney, of Counsel. Court House—Monument Square, Troy, New York

WILLIAMS, *J.*

This is an Article 78 proceeding brought by order to show cause in which the petitioner seeks to set aside a determination of the respondent Commissioner of Motor Vehicles. Petitioner seeks, *inter alia,* to expunge and vacate *ab initio* the suspension of petitioner's motor vehicle operator's license due to the alleged unconstitutionality of the statute authorizing said suspension (Vehicle and Traffic Law § 510(4-a)) and the failure of the Commissioner to properly implement said statute by the effective promulgation of rules and regulations.

Petitioner was ticketed for a speeding violation in the Town of Catskill on June 20, 1977. As a result of petitioner's failure to appear within three months of the return date, petitioner received from the Motor Vehicle Department form MV-1160 which was entitled "Notice-License Suspended".

In addition, petitioner also received a traffic ticket for a speeding violation in the Town of Saugerties on May 24, 1977. Again, as a result of petitioner's failure to appear within three months of the return date, the Department of Motor Vehicles sent petitioner form MV-1160.

Although the substance and context of form MV-1160 will be discussed infra, it is important to note for the purpose of understanding the factual setting of this proceeding that form MV-1160 purports to effect a suspension of the notified person's operators license (petitioner herein) thirty days from the date of said notice.

Petitioner's operators license was suspended effective November 19, 1977 due to his failure to appear in reference to the ticket issued in the Town of Catskill. Also, as of

December 30, 1977, petitioner's license was suspended as a result of his failure to answer the ticket issued in the Town of Saugerties.

On March 30, 1978, petitioner was arrested for driving while his license was suspended (see, Vehicle and Traffic Law § 511) in the Town of Nassau. On April 12, 1978, a charge was filed against petitioner for driving while his license was suspended on March 11, 1978 in the Town of Schodack. These are the two charges which petitioner seeks this Court to declare void as a result of the alleged unconstitutionality of Vehicle and Traffic Law § 510(4-a) and the respondent Commissioner's failure to properly implement said statute by the promulgation of rules and regulations.

Petitioner's trial in the Town of Schodack on the charge of operating a vehicle while his license was under suspension has already been held. The decision of the Town of Schodack Justice Court in the above matter has been stayed by virtue of the order to show cause in the proceeding now before this Court.

Similarly, the Town of Nassau Justice Court has been stayed from commencing its proceeding in relation to petitioner's operating a vehicle in that jurisdiction while his license was under suspension.

Petitioner, by this proceeding, does not seek to collaterally attack the proceedings in the Town of Schodack and Nassau Justice Courts. Rather, petitioner seeks review of the suspensions themselves, alleging that prior to such suspensions the due process requirements of notice and hearing must be met. In addition, petitioner contends that form MV-1160 is unconstitutional in that it is ambiguous, vague, exceeds the authority granted by statute (Vehicle and Traffic Law § 510(4-a)) and was not promulgated pursuant to the New York State Constitution, Executive Law or the State Administrative Procedure Act. In order for this

Court to properly reach the constitutional issues, it is necessary that we convert this Article 78 proceeding into a declaratory judgment action, and thus proceed. *Matter of Horodner* v. *Fisher,* 38 N.Y. 2d 680, 682.

It should be noted that in the above cited decision, Judge Cooke held that it was proper for petitioner to "seek a stay and, by way of an Article 78 proceeding (CPLR 7803, subd. 3), challenge the action taken". *Matter of Horodner* v. *Fisher, supra,* at p. 685. In that case petitioner sought review of a revocation of his drivers license.

Similarly, since a suspension (like a revocation) is deemed an administrative act which is subject to judicial review (see, Vehicle and Traffic Law § 510(7)), it likewise seems proper for petitioner herein to seek a stay and by way of an Article 78 proceeding challenge the action taken.

Petitioner alleges that Vehicle and Traffic Law § 510 (4-a) is unconstitutional. As to this contention, this Court is compelled to agree.

Vehicle and Traffic Law § 510(4-a) provides in pertinent part as follows:

> "Suspension for failure to answer an appearance ticket. Upon receipt of a Court notification of the failure of a person to appear within three months of the return date or new subsequent adjourned date, pursuant to an appearance ticket charging said person with a violation of any of the provisions of this chapter . . . The commissioner or his agent may suspend the driver's license or privileges of such person pending receipt of notice from the court that such person has appeared in response to such appearance ticket. *Such suspension shall take effect no less than thirty days from the day upon which notice thereof is sent by the commissioner to the person whose drivers license or privileges are to be suspended.*" (emphasis added)

The purpose of this statute is to provide a method by which scofflaws can be prosecuted. Those persons who fail to answer or appear in response to "an appearance ticket charging a violation of this chapter" can expect to have their driver's license suspended. In addition, Vehicle and Traffic Law § 511 renders any person operating a motor vehicle upon a public highway while his license is suspended guilty of a misdemeanor.

It appears that V & T § 510(4-a) in conjunction with V & T § 511 were intended to cause those persons charged with a violation of the Vehicle and Traffic Law to appear before a judicial forum and to answer the charges asserted against them. It is indeed in the public interest that these alleged violators be required to answer the charges asserted against them. To do otherwise, would result in a flagrant disregard for the provisions of the Vehicle and Traffic Law and cause the public safety of our highways to be severely prejudiced.

The suspension of a scofflaw's license is intended to keep those alleged violators from using our public highways and thereby protecting the remainder of our citizenry. This is a legitimate state interest and one which requires this type of exercise of the State's police power.

In order for the statute (Vehicle and Traffic Law § 510 (4-a) to be constitutional the wording of the statute must be, "sufficiently definite, clear and positive to give unequivocal warning to citizens of the rule which must be obeyed . . . The test is whether a reasonable man subject to the statute would be informed of the nature of the offense prohibited and what is required of him. Such warning must be unequivocal . . ." *People* v. *Byron*, 17 N.Y. 2d 64, 66.

The statute in question complies with this rigorous standard only in part. Vehicle and Traffic Law § 510(4-a) unequivocally states that the failure to answer an appearance ticket within three months of the return date can

result in the suspension of one's driver's license. The statute clearly states that said suspension will remain in effect until such time as the court notifies the Department of Motor Vehicles that an appearance has been entered in response to the appearance ticket. This unequivocally informs the citizenry that the conduct required of it is to appear in response to an appearance ticket.

However, the statute does not state when the suspension will take effect. The statute merely states that "such suspension shall take effect *no less than thirty days* from the day upon which notice thereof is sent . . ." The statute is open-ended in that it does not provide a date upon which the suspension will become effective but rather only prohibits the suspension from taking effect within the first thirty days.

Furthermore, the statute does not provide for any notice to the licensee of the suspension becoming effective. Although this would not be fatal if the statute provided a definitive effective date of suspension, under the present wording of the statute the lack of notice and the resulting uncertainty as to when the suspension becomes effective is fatal.

Accordingly, I feel compelled to hold that the V & T Section 510(4-a) is unconstitutional.

The next issue before this Court involves the constitutionality of form MV-1160 and the respondent Commissioner's failure to properly promulgate rules and regulations implementing Vehicle and Traffic Law § 510(4-a).

Petitioner argues that form MV-1160 is vague, indefinite and includes terms which are in excess of the authority granted by Vehicle and Traffic Law § 510(4-a). In addition, petitioner contends that form MV-1160 was not for-

mulated or authorized by any effective regulations. Petitioner also argues that the Commissioner has failed to publish or file with the Secretary of State any regulations which are necessary to implement V & T § 510(4-a).

Respondent Commissioner argues that form MV-1160 is in complete compliance with V & T § 510(4-a) and that said statute is self executing, therefore no regulation or rules are required to be promulgated.

This Court is unable to agree with the respondent and I am compelled to agree with the petitioner.

As quoted previously, Vehicle and Traffic Law § 510(4-a) provides in pertinent part:

> "Such suspension shall take effect no less than thirty days from the day upon which notice thereof is sent by the commissioner..."

Form MV-1106 [sic] is the notice which the respondent commissioner sends to those persons who have failed to appear in response to an appearance ticket. This form contains the following statement:

> "This Department has received notice from the above court that you have failed for a period of three months from the return date, or the most recent adjourned date, to answer a summons for a traffic violation. Under the provisions of section 510(4-a) of the New York State Vehicle and Traffic Law the Commissioner of Motor Vehicles is authorized to suspend your driver's license or privileges for such failure. Accordingly, this order suspending your driver's license or privilege has been issued and will become effective thirty days from the date of this notice, unless we have been notified by the court that you have answered the summons *or your record indicates that other action is necessary.*" (emphasis supplied)

This notice fails to comply with Vehicle and Traffic Law § 510(4-a) in a very significant respect. The previously emphasized portion of MV-1160 which states that the suspension will take effect unless "your record indicates that other action is necessary" is not authorized by V & T § 510(4-a).

Vehicle and Traffic Law § 510(4-a) conditions the suspension becoming effective "pending receipt of notice from the court that such person has appeared . . ." No mention is made of any records indicating any other necessary action. The words in the statute mean precisely what they say and the respondent can not under the guise of administering the statute ascribe a different meaning or add to the terms of the statute. *1 N.Y. Jur. § 63.*

In addition the phrase "your record indicates other action is necessary" creates a great deal of uncertainty as to whether the suspension will ever go into effect. Absent this phrase, the licensee who receives Form MV-1160 would know that if he fails to enter an appearance the suspension will become effective at some future point in time.

However, when the above quoted phrase is included, the licensee never knows whether the suspension will become effective. Since there is no procedure for notification of the suspension becoming effective, the licensee would never know if his "record indicates that other action is necessary" and therefore would not know if the suspension had become effective.

In addition, the phrase "your record indicates that other action is necessary" is vague and uncertain. It is not defined in any published rules or regulations nor have counsel directed the court's attention to any statutory or case law definition. This uncertainty and vagueness would result in the licensee not being able to determine what action is required of him. As a result, under the pre-

viously quoted standard enunciated by Judge Keating in *People* v. *Byron, supra,* form MV-1160 is an unconstitutional method of implementing Vehicle and Traffic Law § 510(4-a). The vagueness of MV-1160 and the attendant uncertainty related thereto can result in a misdemeanor conviction for violation of Vehicle and Traffic Law § 511 (operating a motor vehicle with a suspended license). I am therefore obligated to hold that this form and method of implementing V & T § 510(4-a) is unconstitutional.

Lastly, I reach the issue of whether the respondent Commissioner was under a duty to promulgate rules and regulations to implement V & T § 510(4-a) as required by the New York State Constitution, *The Executive Law* and the State Administrative Procedure Act.

State Administrative Procedure Act (herein referred to as S.A.P.A.) § 102(a)(i) defines rule as "*the whole or part of each agency statement, regulation or code of general applicability that implements or applies law,* or prescribes the procedure or practice requirements of any agency . . ." (emphasis supplied). See also, *Executive Law* § 101-a (1)(b).

S.A.P.A. § 202 provides the method and procedure that must be followed prior to adoption of the rule. See also, *Executive Law* § 101-a(2).

S.A.P.A. § 202 provides that "No rule shall become effective until it is filed with the Secretary of State . . ." See also, N.Y. Constitution Article IV Section 8 and *Executive Law* § 102(2).

It is therefore apparent that it is the public policy and the law in this state that any rule or regulation of general applicability promulgated by an administrative agency for the purpose of implementing a law must be adopted in conformity with the above deliniated procedure.

Therefore, respondent commissioner was obligated to follow this procedure in implementing Vehicle and Traffic Law § 510(4-a).

In addition, Vehicle and Traffic Law § 514(3) requires the Commissioner to prescribe a form to be used by trial courts in notifying the Commissioner of a licensee's failure to appear within three months of the return date. In addition, the Commissioner is obligated to prescribe a form to be used by trial courts in notifying the Commissioner that an appearance has been entered.

Based upon the proof before this Court, it appears that form MV-1160 is the form prescribed by the Commissioner for the uses designated in Vehicle and Traffic Law § 514(3). However, form MV-1160 was not promulgated or adopted in conformity with the above quoted provisions of the S.A.P.A. (which became effective September 1, 1976). In addition, form MV-1160 was not properly issued pursuant to Executive Law § 101-a and § 102 nor did it become effective in conformity with Article 4 Section 8 of the New York State Constitution.

Accordingly, this Court holds that the Commissioner has failed to properly implement § 510 (4-a) and § 514(3) of the Vehicle and Traffic Law.

Accordingly, Vehicle and Traffic Law § 510(4-a) is unconstitutional as are the procedures which have been adopted to implement it. Therefore the relief sought by petitioner is granted.

Submit order.

[Papers to David Alford, Esq., for submission of order and filing.]

Dated: August 7, 1978
Monticello, New York

APPENDIX G

(TITLE OF CAUSE)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Raymond B. Harding, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, entered in this action on February 7, 1980; the order for judgment on remittitur entered in the Supreme Court of the State of New York, Albany County, on February 22, 1980; and final judgments thereafter entered on February 22, 1980 and April 9, 1980 in the Supreme Court of the State of New York, Albany County.

This appeal is taken pursuant to 28 U.S.C. § 1257(2) and alternatively, 28 U.S.C. § 2103.

Dated: New York, New York
May 1, 1980

HERZFELD & RUBIN, P.C.
By: /s/ HERBERT RUBIN
Herbert Rubin
Counsel for Appellant
40 Wall Street
New York, N.Y. 10005
(212) 344-0680

To:

Counsel of Record
Clerk of the Court, Supreme Court
Albany County
Clerk of the Court, New York
Court of Appeals

(TITLE OF CAUSE)

[AFFIDAVIT OF SERVICE BY MAIL]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HOWARD L. WEXLER, being duly sworn, deposes and says:

1. Deponent is not a party to this action and is a citizen of the United States over eighteen years of age. Deponent's business address is 40 Wall Street, New York, New York 10005.

2. On May 1, 1980, deponent mailed the within Notice of Appeal in the above captioned case to each of the undersigned by depositing the same, enclosed in sealed envelopes with fully prepaid postage thereon, addressed as shown below, in a depository under the exclusive care and custody of the United States Postal Service.

To:

Hon. Robert Abrams
Attorney General, State of New York
Attention: Joseph J. Micare, Esq.
The Capitol, Albany, New York 12224

Hon. Charles J. Wilcox
District Attorney, Rensselaer County
Attention: Robert T. Law III, Esq.
Court House, Troy, New York 12180

Clerk of the Court
Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Clerk of the Court
Supreme Court, Albany County
Court House
Eagle Street
Albany, New York 12207

I certify that all parties required to be served have been served.

/s/ Howard L. Wexler
Howard L. Wexler

Sworn to before me this
1st day of May, 1980

/s/ Mitchell Kassoff
Mitchell Kassoff
Notary Public of the State of New York
No. 31-4684259
Qualified in New York County
Commission Expires March 30, 1982

[Notice of Appeal Filed in Supreme Court of the State of New York, Albany County Clerk's Office on May 2, 1980]

[K-67]

Supreme Court, U. S.
FILED
JUN 6 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1776

In the Matter of the Application of RAYMOND B. HARDING,
Appellant,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, CHARLES J. WILCOX, District Attorney of Rensselaer County, THE TOWN COURT OF NASSAU, THE TOWN COURT OF SCHODACK,
Appellees.

On Appeal from the Court of Appeals of New York

MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL ON BEHALF OF APPELLEE, JAMES P. MELTON, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellee,
James P. Melton, etc.
The Capitol
Albany, New York 12224
Telephone: (518) 474-7154

SHIRLEY ADELSON SIEGEL
Solicitor General of the
State of New York

JOSEPH J. MICARE
Assistant Attorney General of the
State of New York
of Counsel

The Daily Record
Rochester, New York

(6091)

Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

	Page
Table of Authorities	*ii*
Question Presented	2
Statutory Operation	2
Factual Statement	3
Applicable Statutory Provisions	6
ARGUMENT	
This appeal does not raise any substantial Federal question and should be dismissed. New York State Vehicle and Traffic Law, §510(4-a) is constitutional and there was no violation here of procedural due process.	7
CONCLUSION – The appeal should be dismissed.	11

TABLE OF AUTHORITIES

Cases: Page

Bell v. Burson, 402 US 535 (1971) 7, 8

Colautti v. Franklin, 439 US 379, 390 (1979) 10

Dixon v. Love, 431 US 105 (1977) 7, 8, 10

Mackey v. Montrym, 443 US 1 (1979) 7, 8, 9, 10

Mathews v. Eldridge, 424 US 319 (1976) 8, 10

Matter of Horodner v. Fisher, 38 NY2d 680, app dsmd 429 US 802 (1976) 11

Other Authorities:

U.S. Constitution, Fourteenth Amendment 2, 7

New York State Vehicle and Traffic Law:

Article 3-A 10

§261 10

§510(4-a) 2, 3, 4, 6, 7, 10

§511(1) 4, 7

§514(3) 3

New York Civil Practice Law and Rules, Article 78 11

In The

Supreme Court of the United States

October Term, 1979

No. 79-1776

In the Matter of the Application of RAYMOND B. HARDING,
Appellant,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, CHARLES J. WILCOX, District Attorney of Rensselaer County, THE TOWN COURT OF NASSAU, THE TOWN COURT OF SCHODACK,
Appellees.

On Appeal from the Court of Appeals of New York

MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL ON BEHALF OF APPELLEE, JAMES P. MELTON, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES

James P. Melton, Commissioner of New York State Department of Motor Vehicles, one of the appellees, moves the Court to dismiss the appeal on the ground that it is manifest that no substantial Federal question is presented in this case. This is an appeal from an order of the Court of Appeals of the State of New York which unanimously affirmed an order of the Appellate Division of the Supreme Court of the State of New York

unanimously reversing a judgment of Supreme Court, Albany County, which declared New York State Vehicle and Traffic Law, §510(4-a) and the form of notice used by the Commissioner in suspending the appellant's operator's license to be unconstitutional under the due process clause of the Fourteenth Amendment. Reported at 49 NY2d 739, affg 67 AD2d 242, 415 NYS2d 286.

Question Presented

Do the suspension of the appellant's automobile operator's license pursuant to New York State Vehicle and Traffic Law, §510(4-a), and the form of notice used by the Commissioner to implement the statute, offend the constitutionally-guaranteed rights afforded by the due process clause of the Fourteenth Amendment?

Statutory Operation

Subdivision 4-a of section 510 of the Vehicle and Traffic Law provides that the Commissioner of Motor Vehicles may suspend the license of a person who has failed to appear within three months of the return date, pursuant to a traffic appearance ticket on a moving violation, pending receipt of notice that the person has appeared, and that the suspension shall take effect no less than thirty days from the day upon which the notice thereof is sent to such person.

The Commissioner utilized a form, designated MV-1160, to notify a person, in default of appearance, of the suspension that would become effective thirty (30) days from the date of the notice unless there was notification from the Court that the summons had been answered or his record indicated that other action was necessary.

Factual Statement

The appellant, Raymond B. Harding (petitioner), was arrested by a New York State Trooper on May 24, 1977, for speeding and was directed to appear at the Justice Court, Town of Saugerties, New York, to answer to the charge. He did not appear before the Town Justice within three months of the return date, which fact was made known to the respondent by the Court pursuant to section 514(3) of the Vehicle and Traffic Law. A notice of suspension pursuant to section 510(4-a) of that law was forwarded to the petitioner to be effective thirty days from the date thereof advising him of his default, its consequences and his opportunity for relief from the pending suspension of his license by presenting himself before the Court.

The petitioner was also arrested for speeding on June 20, 1977, by a New York State Trooper and was directed to appear before the Town Justice of Catskill, New York, to answer to the charge. He did not appear before that Town Justice within three months of the return date. A notice of suspension to be effective thirty days from the date of that notice was forwarded to the petitioner advising him of his default, its consequences and his opportunity for relief from the pending suspension of his license.

The petitioner was again arrested on March 11, 1978 by New York State Trooper D.E. Morse for speeding in the Town of Schodack, New York and on March 30, 1978 the petitioner was arrested by Trooper E.G. Hines for driving in the Town of Nassau while his license was under suspension.

On the same day, March 30, 1978, petitioner first appeared before Judge Crommie in Catskill and he first appeared before the Saugerties Justice on April 5, 1978. These appearances were made known to the respondent Commissioner, who then lifted the suspension of the petitioner's license. (R-2).

On April 12, 1978, Trooper Morse filed a second charge against the petitioner, namely, driving while his license was suspended

on March 11, 1978, the day that he was arrested for speeding in the Town of Schodack.

On May 12, 1978, a trial was held in the Town of Schodack Justice Court on the charge of appellant's operating a motor vehicle on March 11, 1978, while his license was under suspension in violation of section 511(1) of the Vehicle and Traffic Law. At the trial the defendant challenged the validity of the suspension notice. Before a decision was made in that trial, Harding brought this proceeding to review the suspension of his license, alleging that prior to such suspensions the due process requirements of notice and hearing were not afforded him, and that the form of notice used by the Commissioner is unconstitutional in that it is vague and was not promulgated pursuant to the requirements of New York law, and for an order enjoining the District Attorney and the named Justices from proceeding against the petitioner for the charged traffic violations. Trials in the Justice Courts were stayed pending this proceeding.

Respondents, Commissioner Melton and District Attorney Wilcox, moved in this proceeding for an order dismissing the petition and for judgment declaring that section 510(4-a) of the Vehicle and Traffic Law is constitutional. The Court (Supreme Court, Albany County, WILLIAMS, J.) denied that motion and declared that Vehicle and Traffic Law, §510(4-a), is unconstitutional and that the form used by the respondent Commissioner to implement the statute is also unconstitutional (A-24, A-27). Judgment was entered on August 17, 1978.

On appeal the Appellate Division unanimously reversed the judgment and held that the statute and the form utilized are not unconstitutional nor illegal (A-11-A-15). That Court stated (Herlihy, J.):

> "There is no support for the conclusion of Special Term that section 510 is vague as to a definite date for suspension or as to proper notice. As quoted hereinabove,

section 510 expressly provides that there must be a minimum period of 30 days from the date of the notice of suspension and it is expressly limited to last no longer than the failure of a licensee to appear after such notice is given (see *Kane* v. *City of Brooklyn*, 114 N.Y. 586). Section 510 expressly required notice to the licensee and there is no vagueness in that regard.

"The contention that the form MV-1160 is a rule or somehow unconstitutionally vague is likewise without any support. The statute expressly requires that notice be given to motorists and the form herein is nothing more nor less than the transmittal of notice. There is nothing about the MV-1160 which shows it to be a statement implementing or applying law (Executive Law, §101-a, subd. 1, par. [b]). While it recites the statutory basis for the notice, it does not in any way purport to be anything other than the statutory notice. Accordingly, Special Term erred in construing the MV-1160 as not complying with section 510. The language of MV-1160 quoted hereinabove which indicates that the suspension would become effective 30 days after the date of the notice 'unless * * * your record indicates that other action necessary' is not vague and does not undermine the effectiveness of the notice. It is upon its face a reservation of the right of the Department of Motor Vehicles to take whatever action it might be authorized to take upon a review of his record. This is a power which it had regardless of the particular conduct which prompted the issuance of the MV-1160 because of his failure to appear in court. (A-14)

"Finally, the lack of a pre-suspension hearing is not violative of the petitioner's due process rights. In this case the State's interest is in keeping reckless drivers off the road as was the situation in *Matter of Horodner* v. *Fisher (supra)*. Under such circumstances, the available review pursuant to CPLR article 78 of the order issued is sufficient protection *(Dixon* v. *Love*, 431 U.S. 105; *Matter of Horodner* v. *Fisher, supra)*." (A-15)

An order reversing the Special Term judgment was entered on May 9, 1979 from which the petitioner appealed to the New York

State Court of Appeals (A-8-A-10). A stay of the criminal trials was granted by the Court of Appeals pending the appeal taken by the petitioner.

The Court of Appeals in a unanimous concurrence affirmed the order of the Appellate Division "for the reasons stated in the opinion of Mr. Justice J. Clarence Herlihy at the Appellate Division (67 AD2d 242)" (A-1).

An order and remittitur were entered in the Albany County Clerk's office on February 22, 1980 (A-2) and final judgment was entered on April 9, 1980 (A-6).

The trials in the Justice Courts have not yet been held and are still pending. At no time during the foregoing events while appellant was suspended on the record did appellant ever actually surrender his license.

Applicable Statutory Provisions

Section 510 of the Vehicle and Traffic Law provides in part:

"§510. Suspension, revocation and reissuance of licenses and certificates of registration

* * *

"4-a. Suspension for failure to answer an appearance ticket. Upon receipt of a court notification of the failure of a person to appear within three months of the return date or new subsequent adjourned date, pursuant to an appearance ticket charging said person with a violation of any of the provisions of this chapter (except one for parking, stopping, or standing) or of any lawful ordinance or regulation made by a local or public authority, relating to traffic (except one for parking, stopping, or standing) the commissioner or his agent may suspend the driver's license or privileges of such person pending receipt of notice from the court that such person has appeared in response to such appearance ticket. Such suspension shall take effect no less than thirty days from the day upon

which notice thereof is sent by the commissioner to the person whose driver's license or privileges are to be suspended.

* * *

"§511. Operation while license or privilege is suspended or revoked

"1. Any person operating a motor vehicle upon a public highway while his license or his privilege of operating a motor vehicle in this state or his privilege of obtaining a license issued by the commissioner is suspended or revoked shall be guilty of a misdemeanor, * * *"

ARGUMENT

This appeal does not raise any substantial Federal question and should be dismissed. New York State Vehicle and Traffic Law, §510(4-a) is constitutional and there was no violation here of procedural due process.

Appellant contends that his rights under the due process clause of the Fourteenth Amendment have been offended by the application of the New York State Vehicle and Traffic Law, §510(4-a) whereby his automobile operator's license was suspended without a hearing, as such rights have been defined by this Court in *Bell v. Burson*, 402 US 535 (1971); *Dixon v. Love*, 431 US 105 (1977); *Mackey v. Montrym*, 443 US 1 (1979).*

Appellant loses sight of the fact that the New York State Appellate Division in reversing the lower court unanimously held:

"In this case the State's interest is in keeping reckless drivers off the road" (A-15).

---

*Curiously, petitioner's reliance is placed on the *dissenting* opinion in *Mackey v. Montrym*, 443 US at 19. Jurisdictional Statement, pages 7, 8, 9, 10, 11, 13 and 14.

In *Bell v. Burson*, the Court was not concerned with a "reckless" driver but rather with a participant in a motor vehicle accident who had simply failed to post security under a statutory scheme which significantly involved the issue of liability, yet his license was suspended without any opportunity for a hearing to show there was no reasonable possibility of a judgment's being rendered against him. The State has a compelling interest in preserving the safety of the roads* and thus this case is not materially different from *Dixon v. Love, supra*, nor *Mackey v. Montrym, supra*.

In *Dixon v. Love*, this Court held that the Illinois statute authorizing the suspension or revocation of a driver's license without a preliminary hearing upon a showing that the driver has been repeatedly convicted of traffic offenses** "to a degree which indicates lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws and the safety of other persons upon the highway" (*id.* at 109) did not violate procedural due process.

In *Mackey v. Montrym*, this Court upheld the Massachusetts statute which mandated a suspension of a driver's license without a preliminary hearing upon the receipt by the Registrar of Motor Vehicles of the police report indicating his refusal to submit to a breathalyzer test after his arrest for operating a motor vehicle while under the influence of intoxicating liquor.

The three pronged test by which this Court determined there was no due process violation in either of the above cases as formulated in *Mathews v. Eldridge*, 424 US 319 (1976) is easily passed by the New York provision challenged by this litigation.

---

*Annexed hereto as R-1 is a printout of Harding's operating Record as contained in the records of the Department of Motor Vehicles.

**Dixon in a period of 5-1/2 years (1) had his license suspended for three convictions within a 12-month period, (2) was convicted for driving while his license was suspended, and (3) was convicted of speeding three times within a period of seven months.

The first step in the balancing process is to identify the nature and weight of the private interest which is affected. Here too the private interest is the license to operate a motor vehicle. As emphasized in *Mackey*, "The duration of any potential wrongful deprivation * * * is an important factor in assessing the impact of official action on the private interest involved" (*id.* at 12). Here the driver simply turns up in court in response to the traffic summons and the suspension automatically lapses. This is dramatically shorter in duration even than the "immediate hearing" available in *Mackey*.

The second test involves consideration of the likelihood of error. This Court said in *Mackey* that it has generally required "no more than that the predeprivation procedures * * * provide a reasonably reliable basis for concluding that the facts [justify] the official action" (*id.* at 13). Here the basis for the suspension is the fact of a notice from the Court that the driver had defaulted in appearance for more than three months. The risk of error is minimal. Moreover, the driver has a timely opportunity to correct any possible errors simply by appearing (*id.* at 15).

Moreover, as in *Mackey v. Montrym*, it is hard to see how reliability would be enhanced by mandating a pre-suspension hearing. It would be "an exercise in futility" (*id.* at 16); the statute, like the Massachusetts statute in *Mackey*, has already made the determination that triggers the suspension. It cannot be said that the determination that after a driver has failed to appear for three months in response to a ticket for a moving violation — in this case, speeding — he should be given notice that in no less than 30 days his license may be suspended for his failure to appear, is not eminently fair.

For the third and final test, the governmental interest served, weighs most strongly in favor of the State. The State plainly has the right to provide a "strong inducement" (*id.* at 18) to bring drivers ticketed for traffic violations "(except one for parking, stopping or standing)" before the Court. The Legislature is presumed to have found that measures such as this were needed

to bring about better compliance with traffic tickets (Vehicle and Traffic Law, §510[4-a]). Limiting the statute to moving violations and thus highlighting the State's concern with safety on the road, as in *Dixon v. Love* and in *Mackey v. Montrym*, is acknowledged to be not only a legitimate, but an urgent state concern. And in exercising its police powers, the State is not required by the due process clause to draw finer distinctions than that. *Mackey, supra*, at 19.

Surely, a driver who has defaulted for more than three months on a ticket for a moving violation cannot stand before this Court and assert that his private right to operate a motor vehicle is greater than the interest of the State in encouraging compliance with the most elementary procedures for enforcement of highway safety, to wit, notice of suspension of his license if he does not appear in court within the next 30 days.

There is no question that a reasonable person subject to this statute is properly informed by the statutory procedure of the nature of the offense prohibited and its consequences (*Colautti v. Franklin*, 439 US 379, 390 [1979]), as well as of what is required of him to relieve him from the suspension, namely, appear in court. The procedure grants a sufficient warning time to permit the offender to correct the prohibited conduct before the suspension will become effective. This surely provides sufficient safeguard to satisfy due process and is constitutional (*Dixon v. Love, supra*, 431 US 105 [1977]; *Mathews v. Eldridge*, 424 US 319, 333 [1976] and *Mackey v. Montrym, supra*, 443 US 1 [1979]).

The notice clearly apprised this recipient of the risk of suspension. He had several options: He could question the notice, appeal therefrom within the stated time before the suspension became effective*, seek judicial review in a civil proceeding

---

*Article 3-A of the Vehicle and Traffic Law created an Administrative Appeals Board to review appeals of suspension or revocation orders issued by the Commissioner. Section 261 of that law sets forth the appeals procedure. The appellant never utilized this appeal process.

under Article 78 of the New York Civil Practice Law and Rules, or he could simply appear before the Court. There is ample due process under this procedure (*Matter of Horodner v. Fisher*, 38 NY2d 680, app dsmd 429 US 802 [1976]).

The statute, which provides for the suspension of the license without a hearing until the petitioner submits to the Court to answer the charges against him, is a valid exervise of the State's police power and is not a denial of due process. The "timing of the legal process due the licensee" is appropriate (*Mackey v. Montrym, supra*, 443 US at 11).

This appeal lacks a substantial Federal question and should be dismissed (*Matter of Horodner v. Fisher, supra*).

CONCLUSION

The appeal should be dismissed.

Dated: Albany, New York
May 28, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellee,
James P. Melton, etc.
The Capitol
Albany, New York 12224
Telephone: (518) 474-7154

SHIRLEY ADELSON SIEGEL
Solicitor General of the
State of New York

JOSEPH J. MICARE
Assistant Attorney General of the
State of New York
of Counsel

APPENDIX

State of New York DEPARTMENT OF MOTOR VEHICLES,
Empire State Plaza, Albany, New York 12228

ABSTRACT OF OPERATING RECORD

REQUEST CODE
****** ML

In compliance with Section 354 of the Vehicle and Traffic Law, I hereby certify that I have caused a search to be made of the records of the Department of Motor Vehicles, with respect to:

HARDING, RAYMOND, B
3135 JOHNSON AV
RIVERDALE NY 10471

VIS
Date of Birth 1/31/35
Sex MALE
Print Date 7/27/78
Identification No. HO163796878961255-35
Type of License *4*
Date of Issuance 1/31/81
Requested As:

RESTRICTIONS A
INDICATORS 00000000 10001000 01011000

FRMT 00 1811

ABSTRACT OF OPERATING RECORD

R-1

Abstract of Operating Record

Type	Date of Viol. Order or Acc.	Case Number or Conviction Date	Order No. or Location of Accident or Court	Description		Pts.	FINE $	Remarks	Batch Number
HEIGHT 6 2	EYE	COLOR HA		LICENSE BATCH 7022313208					
	X 69110	00000							
	C 00003	89298							
	H 40222	10408							
VOLS	5/19/70			N.J.					
	2/22/74			DRVG LICENSE REINST					
SUSP	11/19/77	0000000	M101977	FLD ANSWER SUMMONS					7101701953
	3/30/78	0000000	M101977	SUMMONS ANSWERED					7101701953
SUSP	12/30/77	0000000	D113077	FLD ANSWER SUMMONS					7112905564
	4/05/78	0000000	D113077	SUMMONS ANSWERED					7112905564
CONV	6/20/77	4/07/78	GREE 53	SPEEDING	73/55	3	50		8042521930
CONV	3/11/78	4/18/78	RENS 62	SPEEDING	75/55	3	CD		8051221430
	5/12/78			WARNING LETTER					
CONV	5/24/77	4/07/78	ULST 64	SPEEDING	75/55	3	50		8051725030
	C RV	0000000							
REV	5/12/78	0816723	A805180	3 SPEED/MISDEM MO		Y		5/12/78	
CONV	4/12/76	4/14/78	ULST 61	SPEEDING	76/55	3	25		8051920130
CONV	5/24/76	4/14/78	ULST 61	SPEEDING	72/55	3	25		8051920130

Type	Date of Viol. Order or Acc.	Case Number or Conviction Date	Order No. or Location of Accident or Court	Description	Pts.	FINE $	Remarks	Batch Number
CONV	9/29/76	4/18/78	ORAN 52	SPEEDING 79/55	3	30		8051921330
	C 00008	16723						
POINT	REDUCTION	COMPLETED	(4/29/78)					
	Q 00000	00039			−3			
RESTRICTED LICENSE ISSUED			(5/26/78)					
	D 80526	70057						

THE ACCIDENT REPORTS LISTED ABOVE OCCURRED ON OR AFTER SEPTEMBER 1, 1965. BECAUSE REPORTS WITH INSUFFICIENT INFORMATION ARE NOT RECORDED, THIS MAY NOT BE A COMPLETE LIST OF THE ACCIDENTS THE PERSON HAS BEEN INVOLVED IN SINCE SEPTEMBER 1, 1965. POINT VALUES OF CERTAIN CIOLATIONS WERE CHANGED AS OF DECEMBER 1, 1966. THIS WILL ACCOUNT FOR DIFFERENCES IN POINT VALUES SHOWN ABOVE.

SS—Suspended Sentence
BF—Bail Forfeiture
P—Police
UD—Unconditional Discharge
CD—Conditional Discharge
3—Not to be considered in Re-examination Program

COMMISSIONER OF MOTOR VEHICLES
Certified by /s/ JAMES A. RUSSETT
Certification Clerk or other Authorized Signature

JUL 27 1978
(SEAL)

Supreme Court, U. S.
FILED
JUL 3 1980
MICHAEL RODAK, JR., CLERK

79-1776

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1176 (Incorrect)

In the Matter of the Application of RAYMOND B. HARDING,
Appellant,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, CHARLES J. WILCOX, District Attorney of Rensselaer County, THE TOWN COURT OF NASSAU, THE TOWN COURT OF SCHODACK,
Appellees.

On Appeal from the Court of Appeals of New York

MOTION PURSUANT TO RULES 16(a) AND 16(d) TO DISMISS APPEAL ON BEHALF OF APPELLEE, CHARLES J. WILCOX, DISTRICT ATTORNEY OF RENSSELAER COUNTY

ROBERT J. ARMSTRONG,
Assistant District Attorney,
Rensselaer County, New York
Attorney for Appellee,
Charles J. Wilcox, etc.
Rensselaer County District Attorney
Rensselaer County Court House
Troy, New York 12180
Telephone: (518) 270-5250

CHARLES J. WILCOX
District Attorney of
Rensselaer County, New York

ROBERT T. LAW III,
Assistant District Attorney of
Rensselaer County, New York
of Counsel

The Daily Record
Rochester, New York

(6180)

Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

	Page
Table of Authorities	*ii*
Questions Presented	2
Factual Statement	2
ARGUMENT — The Doctrine of Abstention mandates that this Court withhold declaratory relief where a state criminal proceeding is pending.	6
CONCLUSION — The Appeal should be denied.	9

TABLE OF AUTHORITIES

Cases:	Page
Railroad Comm'n v. Pullman Co., 312 US 496 (1941)	6
Younger v. Harris, 401 US 37 (1971)	6
Samuels v. Mackell, 401 US 66 (1971).....	7

Other Authorities:

28 USC § 2283	6
New York State Vehicle and Traffic Law § 510 (4-a)	2, 4, 8

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1176

In the Matter of the Application of RAYMOND B. HARDING,
Appellant,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, CHARLES J. WILCOX, District Attorney of Rensselaer County, THE TOWN COURT OF NASSAU, THE TOWN COURT OF SCHODACK,
Appellees.

On Appeal from the Court of Appeals of New York

MOTION PURSUANT TO RULES 16(a) AND 16(d) TO DISMISS APPEAL ON BEHALF OF APPELLEE, CHARLES J. WILCOX, DISTRICT ATTORNEY OF RENSSELAER COUNTY

CHARLES J. WILCOX, District Attorney of Rensselaer County, New York, one of the Appellees, moves the Court to dismiss the Appeal on the ground that the appeal is not within this Court's jurisdiction under the Doctrine of Abstention. This is an appeal from an order of the Court of Appeals of the State of New York which unanimously affirmed an order of the Appellate Division of the Supreme Court of the State of New York unanimously reversing a judgment of Supreme Court, Albany County, which declared New York State Vehicle and Traffic Law

§510 (4-a) and the form of notice used by the Commissioner in suspending the appellant's operator's license to be unconstitutional under the due process clause of the Fourteenth Amendment. Reported at 49 NY2d 739, affg 67 AD2d 242, 415 NYS2d 286.

QUESTIONS PRESENTED

WHETHER THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE NEW YORK COURT OF APPEALS UPHOLDING THE CONSTITUTIONALITY OF NEW YORK STATE VEHICLE AND TRAFFIC LAW §510 (4-a) AND GRANT THE DECLARATORY RELIEF REQUESTED.

FACTUAL STATEMENT

The Appellant, Raymond B. Harding (petitioner), was arrested by a New York State Trooper on May 24, 1977, for speeding and was directed to appear at the Justice Court, Town of Saugerties, New York, to answer to the charge. He did not appear before the Town Justice within three months of the return date, which fact was made known to the respondent by the Court pursuant to Section 514(3) of the Vehicle and Traffic Law. A notice of suspension pursuant to Section 510 (4-a) of that law was forwarded to the petitioner to be effective thirty days from the date thereof advising him of his default, its consequences and his opportunity for relief from the pending suspension of his license by presenting himself before the Court.

The Petitioner was also arrested for speeding on June 20, 1977, by a New York State Trooper and was directed to appear before the Town Justice of Catskill, New York, to answer to the charge. He did not appear before that Town Justice within three months of the return date. A notice of suspension to be effective thirty days from the date of that notice was forwarded to the petitioner

advising him of his default, its consequences and his opportunity for relief from the pending suspension of his license.

The Petitioner was again arrested on March 11, 1978 by New York State Trooper D. E. Morse for speeding in the Town of Schodack, New York and on March 30, 1978 the petitioner was arrested by Trooper E. G. Hines for driving in the Town of Nassau while his license was under suspension.

On the same day, March 30, 1978, petitioner first appeared before Judge Crommie in Catskill and he first appeared before the Saugerties Justice on April 5, 1978. These appearances were made known to the respondent Commissioner, who then lifted the suspension of the petitioner's license.

On April 12, 1978, Trooper Morse filed a second charge against the petitioner, namely, driving while his license was suspended on March 11, 1978, the day that he was arrested for speeding in the Town of Schodack.

On May 12, 1978, a trial was held in the Town of Schodack Justice Court on the charge of appellant's operating a motor vehicle on March 11, 1978, while his license was under suspension in violation of section 511(1) of the Vehicle and Traffic Law. At the trial the defendant challenged the validity of the suspension notice. Before a decision was made in that trial, Harding brought this proceeding to review the suspension of his license, alleging that prior to such suspensions the due process requirements of notice and hearing were not afforded him, and that the form of notice used by the Commissioner is unconstitutional in that it is vague and was not promulgated pursuant to the requirements of New York Law, and for an order enjoining the District Attorney and the named Justices from proceeding against the petitioner for the charged traffic violations. Trials in the Justice Courts were stayed pending this proceeding.

Respondents, Commissioner Melton and District Attorney Wilcox, moved in this proceeding for an order dismissing the petition and for judgment declaring that section 510 (4a) of the Vehicle and Traffic Law is constitutional. The Court (Supreme Court, Albany County, WILLIAMS, J.) denied that motion and declared that Vehicle and Traffic Law, §510 (4-a) is unconstitutional and that the form used by the respondent Commissioner to implement the statute is also unconstitutional (A-24, A-27). Judgment was entered on August 17, 1978.

On Appeal the Appellate Division unanimously reversed the judgment and held that the statute and the form utilized are not unconstitutional nor illegal (A-11-A-15). That Court stated (Herlihy, J.):

> "There is no support for the conclusion of Special Term that section 510 is vague as to a definite date for suspension or as to proper notice. As quoted hereinabove, section 510 expressly provides that there must be a minimum period of 30 days from the date of the notice of suspension and it is expressly limited to last no longer than the failure of a licensee to appear after such notice is given (see Kane v. City of Brooklyn, 114 N.Y. 586). Section 510 expressly required notice to the licensee and there is no vagueness in that regard."
>
> "The contention that the form MV-1160 is a rule or somehow unconstitutionally vague is likewise without any support. The statutes expressly requires that notice be given to motorists and the form herein is nothing more nor less than the transmittal of notice. There is nothing about the MV-1160 which shows it to be a statement implementing or applying law (Executive Law, § 101-a, subd. 1, par. (b)). While it recites the statutory basis for the notice, it does not in any way purport to be anything other than the statutory notice. Accordingly, Special Term erred in construing the MV-1160 as not complying with section 510. The language of MV-1160 quoted hereinabove which indicates that the suspension would become effective 30 days after the date of the notice 'unless' * * *

> your record indicates that other action necessary' is not vague and does not undermine the effectiveness of the notice. It is upon its face a reservation of the right of the Department of Motor Vehicles to take whatever action it might be authorized to take upon a review of his record. This is a power which it had regardless of the particular conduct which prompted the issuance of the MV-1160 because of his failure to appear in court." (A-14).
>
> "Finally, the lack of a pre-suspension hearing is not violative of the petitioner's due process rights. In this case the State's interest is in keeping reckless drivers off the road as was the situation in Matter of Horodner v. Fisher. Under such circumstances, the available review pursuant to CPLR Article 78 of the order issued is sufficient protection."

An order reversing the Special Term judgment was entered on May 9, 1979 from which the petitioner appealed to the New York State Court of Appeals (A-8-A-10). A stay of the criminal trials was granted by the Court of Appeals pending the appeal taken by the petitioner.

The Court of Appeals in a unanimous concurrence affirmed the order of the Appellate Division "for the reasons stated in the opinion of Mr. Justice J. Clarence Herlihy at the Appellate Division (67 AD2d 242)" (A-1).

An order and remittitur were entered in the Albany County Clerk's Office on February 22, 1980 (A-2) and final judgment was entered on April 9, 1980 (A-6).

The trials in the Justice Courts have not yet been held and are still pending. At no time during the foregoing events while appellant was suspended on the record did appellant ever actually surrender his license.

ARGUMENT

The Doctrine of Abstention mandates that this court withhold declaratory relief where a state criminal proceeding is pending.

This Court has consistently refrained from exercising jurisdiction under its policy of abstention in order to avoid needless conflict with the administration by a State of its own affairs. The history of the abstention policy finds its case origin in *Railroad Comm'n* v. *Pullman Co.*, 312 US 496 (1941).

In *Pullman* this Court held that a federal court would abstain from jurisdiction where the State Court could review the constitutional attack on the statute in the first instance and possibly interpret the challenged state statute so as to eliminate, or at least materially alter, the constitutional questions presented.

Thirty years after *Pullman*, on the same day, this court in expanding the *Pullman* precepts of federalism, refused jurisdiction in two cases where the relief sought would affect pending state criminal prosecutions.

In *Younger* v. *Harris*, 401 U.S. 37 (1971) this court in relying on a long standing public policy against federal court interference with State Court proceedings and its interpretation of 28 USC §2283* held that "declaratory relief is also improper when a prosecution involving the challenged statute is pending in State Court at the time the federal suit is initiated." Id., 401 US at 41, note 2. The vital consideration is:

> "The notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country

*"A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

> is made up of a Union of separate state governments and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Id., 401 U.S. at 44.

In a separate opinion, Mr. Justice Stewart with Mr. Justice Harlan concerning enunciated the policy, "that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution." Id. 401 U.S. at 56. The "exceptional and extremely limited circumstances" were held to exist only when "there is a threat of irreparable injury both 'great and immediate'." Id. 401 U.S. at 56. This court also left no doubt as to the exception;

> "certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term."

Even if a state statute is unconstitutional, a person charged under it, including this appellant, normally has an adequate remedy at law by raising a twofold constitutional defense in the State Court proceeding, that is, unconstitutionality of the statute per se and unconstitutionality of the statute as applied.

In *Samuels* v. *Mackell*, 401 U.S. 66 (1971), the counterpart of *Younger*, this Court specifically focused on whether under ordinary circumstances the same considerations that require the withholding of injunctive relief will make declaratory relief equally inappropriate. The appellants in *Samuels* after being indicted in New York State Court on charges of criminal anarchy, filed charges in federal district court challenging certain sections of the New York State Penal Law as unconstitutional. The Appellants further charged that prosecution of the indictment in State Court would harass them and cause them irreparable damages.

This Court in *Samuels* acknowledging that their decision in *Younger* mandated that a U.S. District Court could not issue an injunction to stay proceedings pending in a State Criminal Court at the time the federal suit was initiated, held that the propriety of declaratory relief was subject to the same policy considerations. Id. 401 U.S. at 73.

> "In both situations deeply rooted and long-settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of State proceedings that the long standing policy limiting injunctions was designed to avoid." Id., 401 US at 72

The admitted purpose of a declaratory action is to test the constitutionality of a statute before consummation of the proscribed conduct. Moreover the declaratory procedure invoked subsequent to arrest collaterally attacking the pending and ongoing criminal prosecutions functions only as a form of interlocutory appeal or removal and only promotes piecemeal litigation of the factual and legal issues.

It is further submitted that if this Court hears this case and upholds the constitutionality of Section 510 (4-a) of the New York Vehicle and Traffic Law, conceivably this case could again be before this Court for a determination of the constitutionality of the law as applied to the appellant.

The same policy considerations enunciated by this Court which prevent a federal district court from exercising jurisdiction where a State criminal proceeding is pending, also mandate that this court should not set the case down for argument.

CONCLUSION

The Appeal should be dismissed.

DATED: TROY, New York
June 30, 1980

Respectfully submitted,

ROBERT J. ARMSTRONG,
Assistant District Attorney,
Rensselaer County, New York
Attorney for Appellee,
Charles J. Wilcox, etc.
Rensselaer County District Attorney
Rensselaer County Court House
Troy, New York 12180
Telephone: (518) 270-5250

CHARLES J. WILCOX
District Attorney of
Rensselaer County, New York

ROBERT T. LAW III,
Assistant District Attorney of
Rensselaer County, New York
of Counsel